

0070B

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

ALBERT E. DEATLEY and IVA
DEATLEY,

Appellants,

v.

YAKIMA COUNTY, GEORGE AND RUTH
NEWLAND (YAKIMA CONCRETE AND
ASPHALT COMPANY), and State of
Washington DEPARTMENT OF
ECOLOGY,

Respondents.

SHB Nos. 89-3 & 90-17

ORDER GRANTING PARTIAL
SUMMARY JUDGMENT

On November 21, 1988 Yakima County issued shoreline substantial development, variance and conditional use permits for a concrete batch plant, asphalt plant, permanent offices and shop facility, and surface mining operations along the Yakima River. On December 29, 1988 the Department of Ecology (DOE) approved the permits. An appeal was filed with the Shorelines Hearings Board (SHB), which became SHB No. 89-3. DOE certified the appeal on January 31, 1989.

After motions practice, the Board dismissed the appeal for lack of standing. Thurston County Superior Court reversed the dismissal and remanded the appeal to the Board.

On March 22, 1990, Yakima County issued a revision to the shoreline substantial development and conditional use permits, removing requirements for elevating structures. Appellants filed a

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1 request for review with the SHB on April 2, 1990, which became SHB No.
2 90-17. DOE certified the appeal on May 11, 1990.

3 The Board consolidated the two appeals.

4 On April 30, 1990 a prehearing conference was held which all
5 parties attended. As a result, a Pre-hearing Order was issued May 4,
6 1990, listing the legal issues, scheduling the hearing on the merits
7 for November 13-16, 1990, specifying interim dates, and so forth.
8 These legal issues were supplemented, without opposition, by
9 respondent Newlands' filing on May 11, 1990 and by appellants' filing
10 on May 21, 1990.

11 The Board has also considered the following filings with
12 attachments:

- 13
14 1. Respondent Newlands' Motion, Memorandum in Support of Motion to
15 Dismiss (8/30);
16 2. Appellants' Motion for Summary Judgement (9/21);.
17 3. Appellants' Responsive Brief for Dismissal (9/20);
18 4. Respondent Newlands' Brief Opposing S/J (10/4);
19 5. Respondent Newlands' Supplemental Brief Opposing S/J (10/4);
20 6. Respondent Yakima County's Memo Opposing S/J (10/4);
21 7. For appellants, affidavit of Robert Rowley (10/4);
22 8. Appellants' Response to Motion to Strike and Responding to
23 Supplemental Material (10/4);
24 9. Appellants' Reply Brief on S/J (10/5/90);
25 10. For respondent Newlands' affidavit of Richard F. Anderwald.

26 Having considered the foregoing, and having deliberated, the Board
27 issues these:

CONCLUSIONS OF LAW

I

Disputed issues of material fact exist as to respondent Newlands'

1 motion for dismissal and appellants' motion for summary judgment.
2 Therefore, both these motions are DENIED.

3
4 II

5 The filings that have been made, however, have transformed
6 respondent Newlands' motion to one for summary judgment. Superior Court
7 Civil Rule 12. Opportunity to present pertinent material has been
8 afforded.

9 III

10 The Shoreline Hearings Board does not have jurisdiction to require
11 Yakima County at this juncture to seek enforcement action. However, the
12 Board as a factual matter can consider whether the permittees have been
13 operating under a pre-existing permit and whether it remains in effect,
14 has been superceded, and so forth. Such material facts are in dispute.

15 IV

16 The Board does not have jurisdiction to determine the facial
17 validity of the Yakima County Shoreline Master Program. However, the
18 Board has jurisdiction to consider the Program as applied.

19 V

20 We conclude that the proper official did act on behalf of the County
21 in the SEPA process. It is unrefuted that the County had contracted with
22 this individual to perform as a SEPA official.

23 VI

24 An Environmental Impact Statement (EIS) was done. Therefore, the
25 legal issue on offering a mitigated DNS is moot. Similarly, SEPA
26

1 Checklist issues are cured by the issuance and circulation of an EIS,
2 and are therefore moot.

3 VII

4 The Board's de novo proceedings provide adequate procedural
5 safeguards, and we, therefore, decline to resolve the appearance of
6 fairness issue. Washington Environmental Council v. Douglas County,
7 Department of Transportation, et al., SHB No. 86-34.

ORDER

Respondent Newlands' Motion to Dismiss is DENIED. Appellants' Motion for Summary Judgment is DENIED.

Partial Summary Judgment for Respondent ^{Newlands} is GRANTED in conformance with this opinion.


DONE this 2nd day of November, 1990.

SHORELINES HEARINGS BOARD


JUDITH A. BENDOR, Presiding


HAROLD S. ZIMMERMAN, Member


ANNETTE S. MCGEE, Member


NANCY BURNETT, Member


GORDON F. CRANDALL, Member


STEVEN W. MORRISON, Member

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

ALBERT E. DEATLEY and IVA
DEATLEY,

Appellants,

v.

THE COUNTY OF YAKIMA, GEORGE
NEWLAND, RUTH NEWLAND, and
YAKIMA CONCRETE AND ASPHALT
COMPANY,

Respondents.

SHB No. 89-3

ORDER DENYING REQUEST
FOR RECONSIDERATION

On April 6, 1989, Attorney Robert C. Rowley, representing appellants Deatley, filed a Petition to Reconsider the Board's final Order in this matter. Responses and replies of the parties were filed thereafter.

Having considered the request and having reviewed the file and record herein and being fully advised

NOW THEREFORE IT IS ORDERED that the request for reconsideration is denied.

DONE at Lacey, Washington, this 16th day of May, 1989.

SHORELINES HEARINGS BOARD

Wick Dufford

WICK DUFFORD, Chairman

(See Dissent)

JUDITH A. BENDOR, Member

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Member

Nancy Burnett
NANCY BURNETT, Member

Paul Cyr
PAUL CYR, Member

BEFORE THE SHORELINES HEARINGS BOARD
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ALBERT E. and IVA DEATLEY,

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v.

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NEWLAND; and YAKIMA CONCRETE
AND ASPHALT COMPANY,

Respondents.

SHB No. 89-3

ORDER GRANTING
MOTION TO DISMISS

The matter involves the Request for Review of the approval of a concrete batch plant and permanent office and shop facility, and to qualify an existing surface mining operation including erection of a 75 foot high concrete plant and a 40 foot high asphalt plant within the shoreline of the Yakima River.

Yakima County issued a substantial development/variance/conditional use permit to George and Ruth Newland on November 21, 1988. The Department of Ecology approved the permit

1 on December 29, 1988. On January 25, 1989, the Request for Review was
2 received by the Shorelines Hearings Board. On February 6, 1989, the
3 Board received from the Department of Ecology and Attorney General a
4 certification that the "requestor has valid reasons to seek review
5 prusuant to RCW 90.58.180(1)."

6 On February 15, 1989, Yakima Concrete and Asphalt Company filed a
7 Motion to Dismiss. Oral argument was heard by telephone conference on
8 March 3, 1989. Supplemental submissions from appellants were received
9 on March 9, 1989.

10 In this matter, appellants Deatley were represented by Robert C.
11 Rowley, Attorney at Law. Respondents Newland and Yakima Concrete
12 Asphalt Company were represented by G. Scott Beyer, Attorney at Law.
13 Terry Austin, Deputy Prosecutor, represented Yakima County.

14 The arguments were heard and the record reviewed by the Board,
15 Wick Dufford (Presiding), Judith A. Bendor, Harold S. Zimmerman, Nancy
16 Burnett and Paul Cyr, Members. The Board announced its decision to
17 the parties orally on March 10, 1989. This Order memorializes that
18 decision.

19
20 I

21 In reaching its decision, the Board considers the following:

- 22 1. Request for Review (Yakima County File No. SH 87-9), with
23 attached exhibits;
24 2. Respondent Yakima Concrete and Asphalt Company's Motion to
25

26 ORDER GRANTING
27 MOTION TO DISMISS
SHB No. 89-3

1 Dismiss with:

- 2 a) Memorandum of Points and Authorities in Support of Motion
3 to Dismiss;
4 b) Affidavit of Fred C. Hobbs; and
5 c) Shoreline Management Substantial Development, Conditional
6 Use and Variance Permit (File No. SH 87-9), signed
7 November 21, 1988.

8 3. Supplemental Memorandum of Points and Authorities in Support
9 of Motion to Dismiss;

10 4. Petitioner's Memorandum in Opposition to Dismissal Motion,
11 with Affidavit of Petitioner (Albert E. Deatley) Opposing Motion to
12 dismiss;

13 5. Memorandum of Yakima County in Support of Respondent Yakima
14 Concrete's Motion to Dismiss, with Affidavit of Tom Durant; and

15 6. (Appellants') Supplemental Legal Memorandum (Reply to Yakima
16 County's Memorandum, with Affidavit (Robert C. Rowley, counsel)
17 Responding to Durant Affidavit.

18 II

19 The proposed project is located at the Newlands' gravel pit site
20 south of Highway 24 between the Yakima River and Riverside Road within
21 statutory wetlands of the Yakima River. Yakima Concrete and Asphalt
22 crushes rock at the Newland site to be used for batching concrete and
23 asphalt.
24

25
26 ORDER GRANTING
27 MOTION TO DISMISS
SHB No. 89-3

1 Albert E. Deatley is an owner of Superior Asphalt and Concrete
2 Company which produces, sells and paves asphalt. Superior Asphalt and
3 Concrete Company's plant is approximately one and one-half miles from
4 the Newland pit site. Albert E. and Iva Deatley's residence is
5 approximately eight miles from the Newland site.

6 The Newland site is located within the Yakima River Greenway, a
7 conservation area established in 1977. Yakima Concrete and Asphalt
8 Company's production, sale and paving of asphalt, resulting from
9 operations under the permit would be in direct competition with the
10 business of Superior Asphalt and Concrete Company.

11 III

12 In seeking dismissal, movants assert that a) the appeal was filed
13 too late, b) that lack of comment by the Deatleys on the challenged
14 environmental documents forecloses review of the environmental
15 analysis under the State Environmental Policy Act (SEPA), and c) that
16 appellants lack standing to obtain review before the Shorelines
17 Hearings Board.

18 IV

19 We conclude that appellants lack standing and therefore do not
20 reach the alternative bases asserted.

21 Under RCW 90.58.180(1) review of shorelines permit decisions may
22 be obtained by "any person aggrieved". The same "person aggrieved"
23 standard governs review of SEPA issues. RCW 43.21C.075(4).
24

25
26 ORDER GRANTING
27 MOTION TO DISMISS
SHB No. 89-3

1 Standing under this formulation requires injury in fact to
2 interests arguably within the zone of interests protected by the
3 statutes involved. See United States v. SCRAP, 412 U.S. 669 (1973);
4 Sierra Club v. Morton, 405 U.S. 727 (1972), and the Board's prior
5 decisions in Foulks v. King County, SHB 80-17 and Hildahl v.
6 Stellacoom, SHB 80-33.

7
8 V

9 Albert Deatley's affidavit asserts concerns for economic impacts,
10 local government processes and for the effect of the project on the
11 Greenway. Of these, only the Greenway concern might fall within the
12 zone of interests protected by SEPA. His affidavit merely recites his
13 support for the Greenway and Greenway Foundation.

14 As the the SEPA issues raised, we hold that appellants have
15 failed to present sufficient evidentiary facts to show they will
16 suffer injury in fact to a personal environmental interest. Concerned
17 Olympia Residents v. Olympia, 33 Wn App. 677, 657 P.2d 790 (1983);
18 Coughlin v. Seattle School District, 27 Wn. App. 888; 621 P.2d 183
19 (1980).

20 VI

21 The shorelines issues involve a somewhat different zone of
22 interests. The Shoreline Management Act (SMA) is a land use law
23 protective of interests in property as well as environmental
24 interests. See RCW 90.58.020.

25
26 ORDER GRANTING
27 MOTION TO DISMISS
SHB No. 89-3

1 As to shorelines issues, we hold that appellants have failed
2 again to present sufficient evidentiary facts to show they will suffer
3 injury in fact to interests protected by the statute.

4 Appellants have demonstrated no interference with the use and
5 enjoyment of their property or their use and enjoyment of the
6 shoreline. The most Deatley's affidavit demonstrates is possible
7 impact on his business through competition. We do not believe the SMA
8 is intended to regulate business competition.

9 Appellants' assertions of interest in local government processes
10 reflect no impacts different in kind or severity from that experienced
11 by members of the regulated community generally. Deatley has not
12 shown an individualized personal stake in this subject. See Coughlin,
13 supra.

14 VII

15 In addition to traditional standing analysis, this Board in the
16 past has also relied on the certification of the Department of Ecology
17 and Attorney General as a basis for standing. See Foulks and Hildahl,
18 supra.

19 We take this occasion to reject that approach and overrule our
20 prior decisions to the extent they hold that certification under RCW
21 90.58.180(1) confers standing.

22 It is apparent to us that the review conducted to perform the
23 screening necessary to certify "that the requestor has valid reasons
24

1 to see review" does not look behind the face of the pleadings and does
2 not involve an evaluation of the standing issue. In the instant case
3 there is nothing in the Request for Review from which standing could
4 be inferred.

5 VIII

6 The Request for Review is brought to seek review by the
7 Shorelines Hearings Board of the granting of a shorelines permits
8 issued under RCW 90.58.140. SEPA is supplementary to the SMA. RCW
9 43.21C.060. Absent standing to raise issues under these statutes,
10 there is no basis for the Board to exercise jurisdiction over the
11 ancillary issues raised with respect to the Greenway Act and the
12 appearance of fairness doctrine.
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ORDER

The Motion to Dismiss is GRANTED. Because appellants lack standing the Board is without power to adjudicate their claims.
DONE this 30th day of March, 1989.

SHORELINES HEARINGS BOARD

Wick Dufford

Wick Dufford, Chairman

Judith A. Bendor

Judith A. Bendor, Member

Harold S. Zimmerman

Harold S. Zimmerman, Member

Nancy Burnett

Nancy Burnett, Member

Paul Cyr by William A. Harrison

Paul Cyr, Member

1 BENDOR: DISSENTING OPINION

2
3 I respectfully dissent.

4 The legislature enacted the Shoreline Management Act (SMA),
5 stating that the Act:

6 shall be liberally construed to give full effect to the
7 objectives and purposes for which it was enacted. RCW
8 90.58.900.

8 The SMA also provides that:

9 Any person aggrieved by the granting, denying, or
10 rescinding of a permit on shorelines of the state . . .
11 may seek review from the shoreline hearings board . . .
12 RCW 90.58.180(1).

13 The State Environmental Policy Act (SEPA) similarly provides that when
14 linked to a specific governmental action a "person aggrieved" can
15 appeal determination of SEPA compliance. RCW 43.21C.075(1) and (4).

16 Both statutes' purposes include protection of the environment.¹
17 Such basic goals "become as dust" if a person's standing to challenge
18 governmental action is given a cramped, arid reading. Unfortunately,
19 that is the case with my colleagues' order denying reconsideration.

20 Appellant's filings now clearly show that he is "a person
21 aggrieved". Appellant Albert E. Deatley is a long-time resident of
22 Yakima County. Affidavit Opposing Dismissal, at p. 2. Mr. Deatley

23 ¹ In a hearing on the merits, the SMA covers consideration of the
24 access to the shoreline and questions of private property. This
25 proceeding, however, is a summary proceeding on standing, not on the
26 merits.

1 states:

2 I have conducted activities upon the shorelines of
3 the Yakima river and intend to do so in the
4 future. Affidavit, at p. 2.

5 The proposed concrete batch/asphalt plant's other facilities and
6 surface mining operation are within the shorelines of the Yakima River.

7 These facts were insufficient to prevent dismissal, as appellant
8 had failed to state injuries within the zones of interest protected by
9 the statutes.

10 In unanimously granting dismissal, SHB announced a new rule,
11 holding that DOE certification of an appeal alone was not a sufficient
12 basis to confer standing. Order of Dismissal, March 20, 1989, at p.
13 6. To the extent that previous SHB cases held otherwise, they were
14 explicitly overruled. Order Dismissing, supra, overruling in part:
15 Foulks v. King County, SHB 80-17; and Hildahl v. Steilacoom, SHB 80-33.

16 Since appellant had relied on these cases in substantial measure
17 in resisting the Motion to Dismissal, it is not surprising that his
18 subsequent Affidavit in Support of Reconsideration contained
19 additional facts.²

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21 ² If credibility were an issue, that, of course, cannot be decided
22 by reliance on affidavits. It would necessitate a hearing on that
23 issue. Neither the Board's original unanimous Order of Dismissal, nor
24 the cryptic Order Denying Reconsideration address credibility. It can
25 be observed that when parties make extensive filings and argument, the
small kernel of relevant facts can sometimes be lost "midst the blast".

1 That affidavit states in pertinent part:

2 [. . .] I became a supporter of the Greenway
3 concept and favored preservation of the wetlands. I,
4 my wife, and children all utilize and enjoy the
5 Greenway facilities. Since that date, additional
6 expansion of the Greenway has occurred from Terrace
7 Heights Drive on the south to Selah Gap on the north.
8 The next phase for development of the Greenway is
9 southward across SR 24 to Union Gap on the south. The
10 applicant's property and the site immediately to the
11 south prevent any additional growth of the Greenway
12 Park southerly on the east bank of the river, which is
13 the prime natural habitat still existing. The west
14 side of the river is almost completely devegetated and
15 urbanized. [Page 5]

16 [. . .] I want the county to protect the
17 environment, assure a safe intersection, and encourage
18 development of the Greenway. I have a very high
19 personal stake and a business stake in seeing to it
20 that it does not trade off those worthwhile and often
21 stated goals, especially when I have such a large
22 personal and financial commitment involved. I know
23 that if the shoreline Board does not do something
24 about correcting this permit decision that the Yakima
25 River environment will be forever changed adversely
and unnecessarily. . . . [Page 8; Emphasis added]

16 The Draft EIS, (at Fig. 5, attached), filed on April 24, 1989,
17 makes clear the project is within the Yakima Greenway Boundary.

18 When both affidavits are considered together with Figure 5,
19 appellant has shown

20 'a personal stake' in the outcome of the controversy,
21 so that 'the dispute sought to be adjudicated will be
22 presented in an adversary context and in a form
23 historically viewed as capable of judicial
24 resolution.' Flast v. Cohen, 392 U.S. 83, 101 (1968).
25 This is in contrast to 'a mere interest in the
problem.' United States v. SCRAP, 412 U.S. 669
(1973).
Foulks, supra, at pp. 5-6.

1 See also, Coughlin v. Seattle School District, 27 Wn. App. 888, 621
2 P.2d 183 (1980). Concerned Olympia Residents v. Olympia, 33 Wn. App.
3 677, 657 P.2d 790 (1983). The threat of a specific injury has been
4 shown. SAVE v. Bothell, 89 Wn.2d 862, 675 P.2d 401 (1978). The
5 proposed concrete/asphalt plants and mining threaten appellant's
6 recreational use and enjoyment of the shoreline. See, SAVE, supra;
7 Hildahl v. Steilacoom, supra, at pp. 9-10.

8 I conclude that the record taken as a whole demonstrates
9 standing. The Motion to Reconsider should be GRANTED.

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12 JUDITH A. BENDOR, Member

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14 Attach: Fig. 5 from draft EIS
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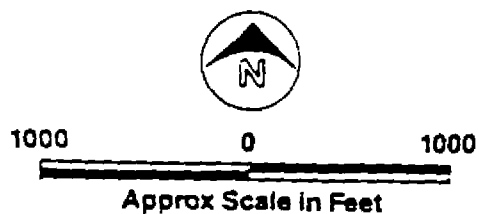
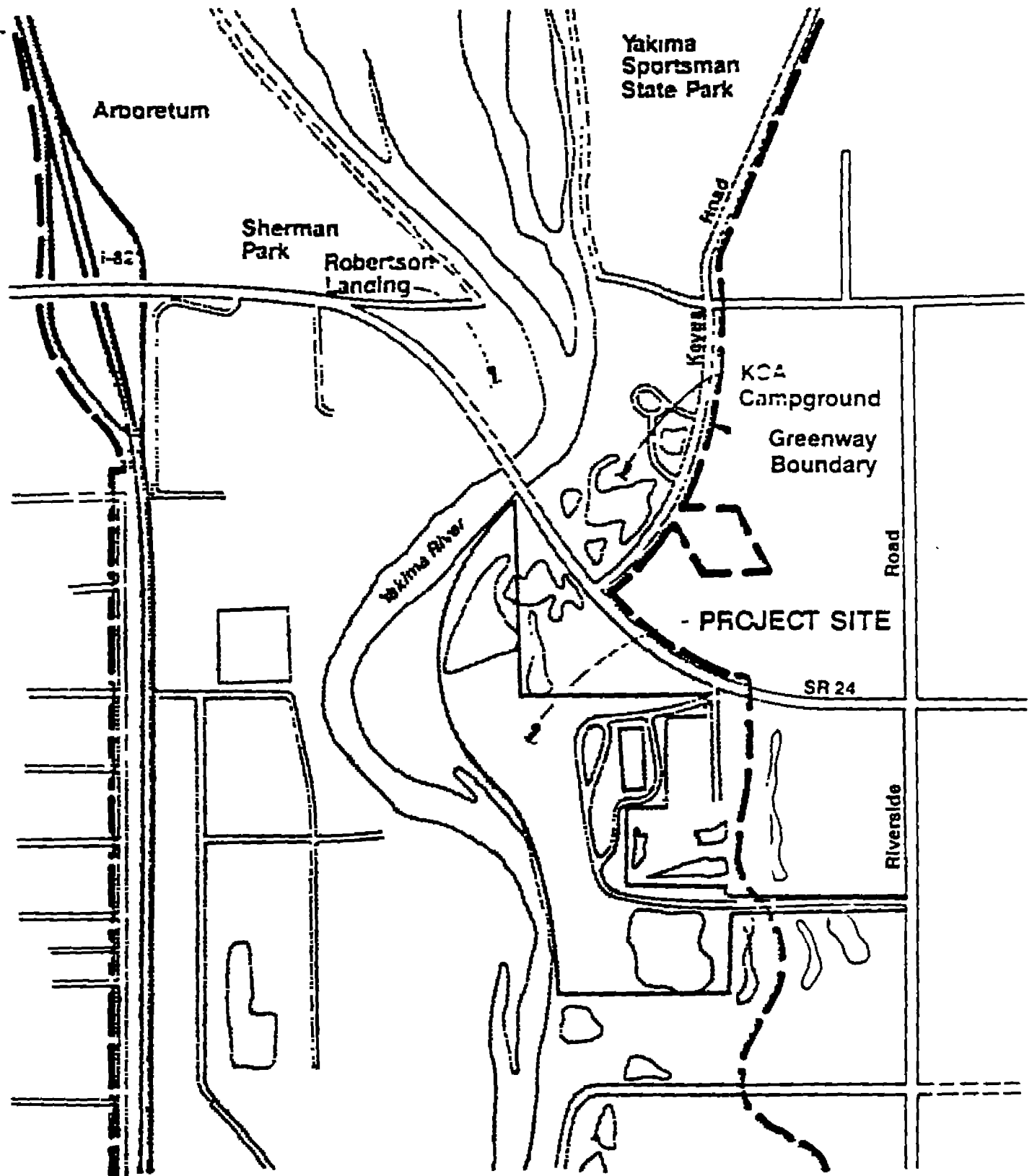


FIGURE 5 C&M HILL
YAKIMA GREENWAY
BOUNDARY MAP